No. 14569.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

On Appeal from the United States District Court for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court did not file an opinion herein. Its grounds for entering the order appealed from are indicated briefly in a preliminary order filed on July 6, 1954. [R. 112-113.]

Jurisdiction.

F. P. Newport Corporation, Ltd., was adjudicated a bankrupt by an order of the District Court for the Southern District of California entered on January 12, 1937

[R. 6-7], acting under authority of Section 2 of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended.[1] On November 20, 1950, Paul W. Sampsell was appointed and is now acting trustee of the bankrupt estate of F. P. Newport Corporation, Ltd. [R. 7-8.] The present appeal involves a claim of the United States, filed with the trustee in bankruptcy on January 7, 1954 [R. 41-43], for federal income taxes assessed against the trustee in bankruptcy for the year 1952 in the amount of $11,391.21, the Government's claim therefor having been successively disallowed below by the referee in bankrutcy [R. 58-59] and by the District Court. [R. 113-114.] (The figure used by the District Court, $11,970.13 [R. 113], includes interest to January 20, 1954. [R. 42.]) The order of the District Court affirming the referee's disallowance of the claim of the United States was entered July 15, 1954. [R. 113-114.] Notice of appeal therefrom was filed by the United States on August 3, 1954. [R. 114-115.] Jurisdiction was conferred on the District Court by Section 2 of the Bankruptcy Act, as amended, and by Section 24, Nineteenth, of the Judicial Code, as amended, now 28 U. S. C., Section 1334. Jurisdiction to hear this appeal is conferred on this Court by 28 U. S. C., Section 1291.

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[1]See, also, *In re F. P. Newport Corp.,* 93 F. 2d 630; 97 F. 2d 504; 98 F. 2d 453 (C. A. 9th), cert. den. *sub nom. McAdoo & Neblett v. F. P. Newport Corp.,* 305 U. S. 660; *City of Long Beach v. Metcalf,* 103 F. 2d 483 (C. A. 9th), cert. den., 308 U. S. 602; *Security-First Nat. Bank v. Bank of America, etc., Ass'n,* 111 F. 2d 50 (C. A. 9th); *United States v. Metcalf,* 131 F. 2d 677 (C. A. 9th), cert. den., 318 U. S. 769; *Security-First Nat. Bank v. United States,* 153 F. 2d 563 (C. A. 9th); *United States v. Metcalf,* 154 F. 2d 56 (C. A. 9th).

Question Presented.

Where a trustee in bankruptcy has been held by this Court to be operating the property or business of the bankrupt corporation within the meaning of Section 52(a) of the Internal Revenue Code of 1939, and hence to be liable for income taxes, does the entry thereafter of an order directing the trustee to liquidate and distribute the assets and close the estate relieve him of liability to pay taxes on subsequent income?

Statute and Regulations Involved.

Internal Revenue Code of 1939:

> Sec. 52. Corporation Returns.
>
> (a) *Requirement.*—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.
>
> * * * * * * * *

(26 U. S. C. 1952 ed., Sec. 52.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

> Sec. 39.52-2. *Returns by receivers.* Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. * * * A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

Statement.

The undisputed facts material to this appeal, as stipulated below[2] and as revealed by the pleadings, may be summarized as follows:

F. P. Newport Corporation, Ltd., the bankrupt herein (sometimes referred to hereinafter as Newport), was incorporated in 1929, and thereafter engaged in the real estate business in California, purchasing large tracts of unimproved land, subdividing and improving them, and selling the lots. [R. 70.] On March 19, 1935, the instant bankruptcy proceedings were instituted by the filing of an involuntary petition, and a receiver was appointed by the court. [R. 3-6, 71.] The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. [R. 6-7, 71.] H. F. Metcalf was appointed trustee in bankruptcy on March 18, 1937, and in that capacity assumed possession and control of all the property and assets of the bankrupt. [R. 71.]

At the date of bankruptcy Newport's assets consisted *inter alia* of numerous parcels of real estate, both improved and unimproved; and approximately 90 per cent of this

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[2]There are two stipulations of facts in the record: A stipulation of facts in connection with claim of Director of Internal Revenue for 1952 income taxes, with exhibits, which was filed herein on March 24, 1954 [R. 55-59]; and a stipulation of facts, with exhibits, filed herein with the referee in bankruptcy on December 31, 1940 [R. 69-110]. The former stipulation is incorporated by reference into the certificate on review of referee's order disallowing federal tax claim, filed herein June 2, 1954. [R. 66-69.] The latter stipulation, by supplemental certificate on review, filed June 24, 1954 [R. 111-112], was also before the District Court in its review of the referee's order.

realty stood in the name of the Security-First National Bank of Los Angeles (hereinafter called the bank), as security for an indebtedness from Newport to the bank exceeding $1,300,000. The bank filed a claim in the bankruptcy proceedings herein as an unsecured creditor in the amount of $500,000, as being the amount by which Newport's indebtedness to the bank exceeded the value of the security. Other claims filed herein totaled in excess of $295,000. [R. 71-72.]

As of the date of the bankruptcy adjudication, January 12, 1937, the bank entered into an agreement with Newport and the trustee in bankruptcy for the purpose of avoiding a forced sale of assets, the agreement providing *inter alia* that the bank would not foreclose on the real property held by it as security provided that specified payments on account of the indebtedness were made on specified dates. [R. 72, 79-103.]

Among the real properties title to which was held by the bank were properties adjacent to lands on which successful oil and gas well operations were conducted during the bankruptcy proceedings herein. The bank and the trustee in bankruptcy wished to develop any mineral assets which might underlie the bankrupt's lands; but the trustee did not have sufficient funds to enable him to drill for oil or gas wells. However, with the approval of the court, the trustee leased certain lands to Universal Consolidated Oil Company, and other lands to the Bankline Oil Company (hereinafter referred to as Universal and Bankline, respectively). Subsequent oil and gas well operations by

these lessees were successful, and substantial oil and gas bonuses and royalties were received in 1938 and 1938 by the trustee, who in turn paid them over to the bank under order of the court. [R. 72-74.]

The trustee in bankruptcy also made sales of real estate during 1938 and 1939, paying 80 per cent thereof to the bank under court order and retaining the balance for administration expenses; rented certain of the real properties, mainly for agricultural purposes; and repaired and improved certain of the properties to preserve them from hazards of fire and flood. [R. 74-75.]

Prior to December 31, 1940, there was no court order entered herein authorizing the trustee to conduct the business of the bankrupt or forbidding him to do so; but the court had made orders authorizing the trustee to make leases of agricultural lands, grant easements, rights of way for streets, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, enter agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the lease to Universal pending determination of title disputes, renew contracts with the Oil Field Testing and Engineering Company, Inc., and lease a barn for the storage of hay. [R. 75-76.]

In *United States v. Metcalf,* 131 F. 2d 677, cert. den., 318 U. S. 769,[3] this Court held that the activities of the

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[3]See, also, *United States v. Metcalf,* 154 F. 2d 56 (C. A. 9th).

trustee in bankruptcy herein, in 1938 and 1939, constituted the operation of the bankrupt's property within the meaning of Section 52 of the Internal Revenue Code of 1939, and that the trustee was accordingly liable for federal income taxes on the income received during the years 1938 and 1939. In all subsequent years until 1952 the trustee filed federal income tax returns showing the items of income and deduction during the course of his administration and paying the tax reported thereon. [R. 55-56.]

On November 20, 1950, the court below entered an order approving the appointment of the present trustee in bankruptcy, Paul W. Sampsell. [R. 7-8.] Thereafter, on April 14, 1952, the present trustee filed a petition for order of liquidation, alleging that it was in the best interests of all concerned to sell the assets at public auction and close the estate. [R. 8-13.] This petition was granted by the referee's order of liquidation, filed May 26, 1952, directing the trustee to sell the assets at either private or public auction and to close the estate. [R. 40-41.] This order of liquidation was confirmed by order of the District Court dated November 28, 1952, and entered March 24, 1954. [R. 57-58.]

The trustee filed a federal income tax return for the calendar year 1952, which included only income and expenses of the trustee for the period January 1, 1952, to May 26, 1952. He did not include in the return income and expenses for the period subsequent to May 26, 1952, for the reason that, as he contended, he was no longer operating the property or business of the bankrupt after

the order of liquidation of May 26, 1952, and therefore was not liable for taxes on income received after that date. The trustee attached to his 1952 income tax return a statement to this effect. [R. 56.] The Commissioner of Internal Revenue, however, took the position that the liquidation order of May 26, 1952, did not relieve the trustee from liability for taxes on income received after that date. Accordingly, on January 7, 1954, the Government filed in the proceedings below its claim for taxes, in which it asserted the deficiency in income taxes for 1952 involved in this appeal. [R. 41-43.] The trustee filed objections to this claim on February 5, 1954 [R. 43-49]; and on March 24, 1954, the referee in bankruptcy entered an order disallowing the claim of the Director of Internal Revenue for 1952 income taxes. [R. 58-59.] The Government petitioned for review of this order [R. 62-65], and the order was thereafter reviewed by the court on certificate and supplemental certificate of the referee [R. 66-69, 111-112] and on the two stipulations of fact described in footnote 2, *supra*. [R. 55-57, 69-78.] Thereafter, the court below entered the order here appealed from, *viz.*, the order affirming referee's order dated March 24, 1954, denying claim of the United States for 1952 income taxes. [R. 113-114.]

Much of the property of the corporation which came into the hands of the trustee still remained unsold on March 18, 1954. [R. 57.]

Statement of Points to Be Urged.

1. The mere entry of an order of liquidation on May 26, 1952, could not, of its own force and effect, terminate the operation of the bankrupt's properties by the trustee within the meaning of Section 52(a); and there is no showing whatever that the trustee's activities changed on May 26, 1952, while, to the contrary, there is affirmative evidence that his activities continued unchanged and that substantial assets remained in his hands until 1954.

2. Even were the trustee engaged only in marshaling, selling, and disposing of the assets of the estate after May 26, 1952, he would still be operating the bankrupt's property under Section 52(a) and Treasury Regulations which have acquired the force of law.

Summary of Argument.

This is an appeal from a ruling in bankruptcy proceedings below that, by virtue of entry of an order directing liquidation, the trustee was no longer "operating the property or business" of the bankrupt within the meaning of Section 52(a) of the Internal Revenue Code of 1939. The trustee had been held by this Court, in an appeal proceeding in 1942, to have been "operating the property or business" under Section 52(a) during the tax years 1938 and 1939; and the trustee thereafter reported income and paid taxes thereon until May 26, 1952, when the order of liquidation was entered. The estate of the bankrupt was not in fact liquidated in 1952, the trustee retaining substantial assets as late as 1954. Nevertheless, the

trustee contended, and the District Court ruled, that entry of the liquidation order on May 26, 1952, relieved him from further compliance with Section 52(a).

We submit that the ruling of the District Court is clearly erroneous. Section 52(a) does not in terms exempt a liquidating trustee; and the pertinent Treasury Regulations thereunder (which have the force of law in view of their history) provide that a trustee in full control of the bankrupt's estate shall be deemed to be operating the business or property whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Furthermore, the great weight of relevant decisions supports the proposition that a liquidating trustee in bankruptcy must comply with Section 52(a). The two decisions cited to the contrary by the District Court are clearly distinguishable.

Therefore, even were there evidence that the trustee's activities changed on May 26, 1952, and that after that date he was engaged solely in liquidating the assets of the bankrupt, it would still follow that he was subject to Section 52(a). But there is no such evidence of record here. To the contrary, there is evidence which indicates that the trustee's activities continued unchanged.

Under these circumstances, the mere entry of an order of liquidation could not of itself avert the application of Section 52(a); and the order of the District Court to the contrary should be reversed.

ARGUMENT.

The District Court Erred in Ruling That an Order of Liquidation in Bankruptcy Proceedings Relieves the Trustee of Further Liability for Federal Income Taxes.

The question presented by this appeal is whether a trustee in bankruptcy was "operating the property or business" of the bankrupt, within the meaning of Section 52(a) of the Internal Revenue Code of 1939, *supra,* throughout the tax year 1952. The same question, with respect to prior tax years, was before this Court in these same proceedings in *United States v. Metcalf,* 131 F. 2d 677, cert. den., 318 U. S. 769; and it was held that the activities of the trustee in 1938 and 1939 constituted the operation of the bankrupt's property within the meaning of Section 52(a) and hence that the trustee was liable for taxes on the income received in those years. Pursuant to that decision the trustee filed income tax returns and paid the tax reported thereon for all subsequent years until 1952, and for the period January 1, 1952, to May 26, 1952. [R. 55-56.] Thus there is no dispute that until May 26, 1952, the trustee was operating the property of the bankrupt within the meaning of Section 52(a).

On May 26, 1952, an order of liquidation was filed below, directing the trustee to liquidate the assets and close the estate. However, the assets were not liquidated in 1952. To the contrary, it is stipulated that on March 18, 1954, much of the property of the bankrupt which came into the hands of the trustee still remained unsold. [R. 57.] And there is no evidence of record that the actual operations of the trustee changed on May 26, 1952. To the contrary, there is evidence which indicates that the trustee's operations continued unchanged. [R. 49-54.]

Nevertheless, the trustee has disclamed liability for federal income taxes after May 26, 1952, contending that, because of the entry of the order of liquidation on that date, he could not thereafter be deemed to be operating the property or business of the bankrupt. [R. 56.] The referee in bankruptcy sustained this contention by order of March 24, 1954, ruling [R. 59] that the—

> order of liquidation of the referee dated May 26, 1952, terminated the trustee's authority to conduct the business of the bankrupt and said trustee was not, subsequent to May 26, 1952, operating said property or business within the meaning of Section 52 of the Internal Revenue Code.

The referee's order was in turn affirmed by the District Court's order of July 16, 1954, from which this appeal is taken. [R. 113-114.][4]

There is, then, no question of fact involved on this appeal. The sole question presented is one of law: Does the mere entry of an order of liquidation in bankruptcy proceedings, of its own force and effect and without regard to the activities of the trustee, avert the application of Section 52(a)? We submit that both the statute

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[4]The District Court, in affirming the referee's order, appears to have been laboring under a misapprehension as to the facts, for it stated in a preliminary order [R. 112]:

> The only question before the Court is whether the Referee was justified in disallowing the claim for taxes on income derived *after liquidation.* The Court is of the view that *from the moment of liquidation,* the Trustee was no longer operating the business. * * * (Italics supplied.)

The undisputed facts, as pointed out above, reveal that the estate of the bankrupt was not liquidated as of May 26, 1952—or indeed at any time during 1952. The record shows only entry of the order of liquidation on May 26, 1952, plus retention of substantial assets by the trustee until 1954.

and the decided cases compel a negative answer to this question, and hence that the order appealed from must be reversed.

Section 52(a) of the Internal Revenue Code of 1939, provides in part that—

> In cases where * * * trustees in bankruptcy * * * *are operating the property or business of corporations,* such * * * trustees * * * shall make returns for such corporations in the manner and form as corporations are required to make returns. (Italics supplied.)

Plainly, this provision states only one requirement for its application, namely, that the trustee shall be "operating the property or business" of the bankrupt. There is no further proviso or condition whatever limiting the application of this provision. What, then, is meant by the controlling phrase, "operating the property or business" of the bankrupt corporation?

An explicit definition of what is meant by the phrase, "operating the property or business," as used in Section 52(a), is given in Section 39.52-2 of Treasury Regulations 118, *supra,* which provides that—

> If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. * * *

This provision of the Regulations, in the light of its history, must be deemed to have the force of law. It made its first appearance in Article 52-2 of Treasury Regula-

tions 86, promulgated under the Revenue Act of 1934, and has appeared successively, without modification, in Treasury Regulations 94, 101, 103, 111, and 118. The relevant provision of Section 52(a) of the 1939 Code, quoted above, formed a part of Section 52 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and was successively reenacted without modification in the Revenue Act of 1936, c. 690, 49 Stat. 1648, the Revenue Act of 1938, c. 289, 52 Stat. 447, and the Internal Revenue Code of 1939. Thus, both the statutory and the regulatory language quoted above have been in continuous force and effect since 1934. Congress reenacted the statutory provision three times without change and without indicating any disagreement with the continued administrative practice evidenced by the quoted provision of the Treasury Regulations. In so doing Congress must be deemed, under well-settled principles, to have approved the regulatory language as a correct interpretation of the statute.[5]

Commissioner v. Munter, 331 U. S. 210, 215;

Crane v. Commissioner, 331 U. S. 1, 8;

Commissioner v. Flowers, 326 U. S. 465, 469, rehear. den., 326 U. S. 812;

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[5]It may be noted further that in the new Internal Revenue Code of 1954, Congress has gone even further than the provision of Treasury Regulations 118 quoted in the text, providing in Section 6012(b)(3) that—

> In a case where a * * * trustee in bankruptcy * * * by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such * * * trustee * * * shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

Legislative history identifies this provision as a *"clarifying change* from the wording of existing law." (Italics supplied.) (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A396.)

Boehm v. Commissioner, 326 U. S. 287, 291-292, rehear. den., 326 U. S. 811;

Douglas v. Commissioner, 322 U. S. 275, 281.

Since, then, the pertinent provision of Treasury Regulations, quoted above, has the force and effect of law, it follows that in determining whether a trustee in bankruptcy is "operating the property or business" under Section 52(a), it is immaterial whether the trustee's activities are or are not directed to the liquidation of the bankrupt. *A fortiori,* the mere entry of an order of liquidation, as here, without any evidence of implementation by the trustee—who retained substantial assets two years later—cannot of itself avert the application of Section 52(a). Without more, we submit, the order here appealed from should be reversed.

Moreover, there is ample confirmation of the Government's position, if confirmation be needed, in the decided cases. First and foremost there is this Court's decision in *United States v. Metcalf, supra,* in which it was held, in these same proceedings, that the trustee was "operating the property or business" of the bankrupt within the meaning of Section 52(a) during 1938 and 1939. That case was decided, of course, before the entry of the order of liquidation here involved; but its rationale is fully broad enough to require reversal in the case at bar. This Court said (p. 679):

> The trustee contends that even if this income was acquired by him in the operation of the bankrupt's property, it is not taxable because the trustee's ultimate objective was the liquidation of the entire estate. That is to say, he would have the pertinent sentence of Section 52 read *"Except where the property of the estate is ultimately to be liquidated, * * * trustees*

*in bankruptcy * * * operating the property * * * of corporations * * * shall make* [income tax] *returns," etc.*

We can see no reason why in an act to raise revenue there should be imputed to Congress such an exception of the principal portion, indeed almost all of, the area of income producing activities in bankruptcy proceedings. When the trustee is operating the properties of a bankrupt corporation it is none the less such operation though of properties ultimately to be liquidated. *Cf. Magruder v. Washington, etc., Realty Corp.,* 316 U. S. 69, * * *.

This sound reasoning is just as applicable to the situation after the entry of the order of liquidation on May 26, 1952, as to the situation before such entry. The order neither directed nor resulted in immediate liquidation. After its entry the trustee continued to hold and operate the property of the bankrupt with the ultimate objective of liquidating the entire estate—just as this Court said he held and operated the property in 1938 and 1939.

This Court said further in the *Metcalf* case (p. 679) that "It is what the trustee does which determines his tax liability," not the entry or non-entry of orders with respect to operation or disposition of the bankrupt's estate. Here the trustee's activities admittedly constituted operation of the bankrupt's property under Section 52(a) until May 26, 1952; and there is no evidence that his activities changed on that date. Therefore, under the rationale of the *Metcalf* case, as well as under the statute and Treasury Regulations, the trustee continued to operate the property of the bankrupt throughout 1952.

Also squarely in point is *Louisville Property Co. v. Commissioner,* 140 F. 2d 547 (C. A. 6th), cert. den., 322

U. S. 755. There it was held that the assignee of corporate property, engaged in its orderly liquidation, was subject to the requirements of Section 52 of the Revenue Acts of 1934 and 1936, which so far as pertinent to that case, as to the case at bar, was identical in wording with Section 52(a) of the Internal Revenue Code. The court rejected the contention of the assignee that (p. 548)—

> Liquidation * * * is the opposite of carrying on business even though income may be realized from the disposal of assets. Hence, he insists, he was not operating the business of the Louisville Property Company, because it had gone out of business, nor its property, because that had been conveyed absolutely for the benefit of creditors and stockholders and the corporation had no further interest in it.

Citing *Magruder v. Realty Corp.,* 316 U. S. 69, wherein the Supreme Court upheld the validity of a provision of Treasury Regulations 64, which classified as "doing business" by a corporation the orderly liquidation of its property, the court in the *Louisville Property Co.* case went on to say (p. 549):

> While the present case differs from the *Magruder* case in that the assignee is not a corporation, we think it clear that the orderly liquidation of property over a period of years, with the purpose of making sales under the most advantageous circumstances, and in the meanwhile contracting for collection of royalties and removal of standing timber, constitutes the carrying on of a business within the rationale of the *Magruder* case, and it will be observed that the operations of the original and successor assignees continued * * * through the tax years, and so far as we are advised, are still being pursued.

So in the case at bar, the most that can be said of the activities of the trustee, after the entry of the liquidation order as well as before, is that they were directed to "the orderly liquidation of property over a period of years, with the purpose of making sales under the most advantageous circumstances"; and that in the meanwhile the trustee was collecting oil royalties and other forms of income from the property.

Finally, the court in the *Louisville Property Co.* case cites with approval this Court's decision in the *Metcalf* case as (p. 549) "An almost identical case" in which "facts are indistinguishable from those in the present case."

Pinkerton v. United States, 170 F. 2d 846 (C. A. 7th), is another decision in point. In this case, decided in 1948 under Section 52(a) of the 1939 Code, the court held that Section 52(a) applied to the receiver of a corporation who collected rents which would have been taxable to the corproration, paid real estate taxes, and sold real estate at a profit. As to the familiar argument that liquidation is not operation of property or business, the court cited with approval *State v. American Bonding & Casualty Co.,* 225 Ia. 638, 281 N. W. 172, saying with respect to that case (p. 848):

> The trustee contended that even if this income was acquired by him in the operation of the bankrupt's property, it was not taxable because his ultimate objective was the liquidation of the entire estate. The court held that it is what the trustee does that determines his liability, and since he had collected various kinds of income from the properties, he was doing business within the meaning of Section 52 of the Revenue Act. * * *

The court in the *Pinkerton* case made the further point that it is immaterial whether the receiver's activities be of short or long duration, saying (p. 848) that Section 52(a) does not "require any particular amount of business in order to bring a company within its terms."

In accord on its reasoning with the above decisions, though decided under a different statute, is *In re Loehr,* 98 Fed. Supp. 402 (E. D. Wis.). The provision involved was 28 U. S. C., Section 960, which provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

In that case a trustee in bankruptcy was appointed who was directed by the court to liquidate the estate, which included many parcels of real estate. The trustee sold the real properties over a period of approximately three years at a net profit, and also collected rentals on unsold properties. The trustee resisted collection of federal income taxes on the rentals and proceeds of sales, contending that (p. 403) "since the trustee had authority only to liquidate, he was not 'conducting any business' and that therefore the statute is not applicable." The court rejected the trustee's contention, saying (p. 403):

> The same question arose in two reported cases which were brought to the attention of the court. In the case of *In re Mid America Co.,* D.C., 31 F. Supp. 601, 606, the court considered the question of "whether a trustee in bankruptcy is liable for contributions under the Illinois Unemployment Compensation Act with respect to individuals who perform services for him in connection with the bankrupt estate." The

court said: "Respondent's contention that this section applies only to trustees who are actually carrying on the business of the bankrupt, and not to liquidating trustees, is unconvincing. The phrase 'conduct any business' should not receive a narrow and restricted interpretation, but should be construed to include any activity or operation in connection with the handling and management of the bankrupt estate. * * *"

The case was considered and approved by the Court of Appeals for the Eighth Circuit. In the case of *State of Missouri v. Gleick,* 135 F. 2d 134, 137, the court said: "The reasoning of Judge Adair in the *Mid America* case seems sound, and, in the absence of a controlling authority to the contrary, we adopt it here. * * *"

This court, too, believes that the *Mid America* case properly construed the statute and the court therefore holds that the claim of the state and federal government for income taxes against the trustee should have been allowed.

We submit that both the provisions of 28 U. S. C., Section 960, and the reasoning of the courts in the *Loehr, Mid America* and *Gleick* decisions are fully applicable to the case at bar and provide further confirmation that a liquidating trustee in bankruptcy is liable for federal income taxes.

In Feigenbaum, The Bankruptcy Triangle: Creditor-Debtor-Commissioner, 30 Taxes, Tax Magazine 448 (1952), it is said of the *Loehr* decision in the course of an illuminating survey of the law on the question here involved (p. 463):

While the *Loehr* case involved a trustee in bankruptcy for an individual rather than a corporation, Section 960, unlike Code Section 52(a), does not dis-

tinguish between an individual and a corporation. Accordingly, it is believed that this case reinforces the proposition that under the provisions of Code Section 52, a trustee in bankruptcy liquidating a corporation is required to file a federal income tax return and pay the tax based upon the income realized as a result of such liquidation.

In sum, then, under Section 52(a), the relevant provisions of Treasury Regulations—which have the force of law—and the decided cases discussed above, it is clear that a trustee in bankruptcy is "operating the property or business" of the bankrupt, if he be in active control of the assets, regardless of whether those assets are being held with the ultimate objective of liquidation or, indeed, are being marshaled and sold in the course of liquidation.

The two decisions cited to the contrary by the District Court [R. 112-113] are distinguishable from the case at bar. The first, *In re Owl Drug Co.,* 21 Fed. Supp. 907 (Nev.), was a case where the trustee in bankruptcy had sold all the assets of the bankrupt and deposited the proceeds of the liquidation in various banks, pending distribution arrangements; and the sole question was whether interest earned by the deposits was income which the trustee was required to report under Section 52(a). The court pointed out, correctly (p. 910), that the interest was earned, not by the property or business of the bankrupt, but by the money into which the business had been transmuted by the sale. Thus this case was soundly distinguished in the *Louisville Property Co.* case, *supra,* as being (p. 549) "decided with respect to income arising after the business of liquidation was completed and the property of the corporation entirely disposed of." So far as the reasoning of the court in the *Owl Drug Co.* case

went beyond the situation before it, and may be read to conflict with the cases discussed above, it is surely not sound law. The decision ignored the long-standing provision of Treasury Regulations discussed above, and has been critcized on that ground in 3 Collier on Bankruptcy, Sec. 62.14 (14th ed.), quoted in Feigenbaum, The Bankruptcy Triangle, *supra,* p. 461.

The other decision cited by the District Court, *California State Board of Equalization v. Goggin,* 191 F. 2d 726 (C. A. 9th), is irrelevant to the case at bar because the construction and application of Section 52(a) were not involved. The question was whether liquidation sales made by a trustee in bankruptcy pursuant to court order were subject to a California sales tax; and under the California law involved the further question was whether the sales were made in the course of continued operation of the bankrupt's business. Obviously, in the light of the foregoing discussion of Section 52(a), the pertinent provisions of Treasury Regulations, and decided cases thereunder, the scope of the phrase, "operating the property or business" of the bankrupt, reaches far beyond the mere continued operation of the business which the corporation pursued before it was adjudicated bankrupt. As has been demonstrated, Section 52(a) applies to liquidating trustees in bankruptcy as well as to trustees who are continuing the business of the bankrupt; and, *a fortiori,* it applies in the case at bar where the trustee necessarily relies upon the mere entry of an order of liquidation.

Conclusion.

For all of the foregoing reasons, we submit that the order of the District Court here appealed from was in error and should be reversed.

Respectfully submitted,

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